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In the Supreme Court of the United States

OCTOBER TERM, 1956

UNITED STATES OF AMERICA, APPELLANT

v.

CHARLES T. HVASS

On Appeal from the United States District Court for the Northern District of Iowa, Central Division

---

BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO AFFIRM

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The court below dismissed an indictment for perjury on the ground that sworn testimony given in a proceeding conducted under a local rule of court to determine an attorney's fitness to practice before it was not testimony in a "case in which a law of the United States authorizes an oath to be administered", within the meaning of the federal perjury statute (18 U.S.C. 1621). Appellee admits that this Court has jurisdiction to hear this appeal under the Criminal Appeals Act (18 U.S.C. 3731) because the dis-

missal of the indictment was predicated upon a construction of the perjury statute (Motion 5), but he moves this Court to affirm the judgment of the district court on the ground that the question is insubstantial.

Appellee contends that this Court is bound by the ruling of the district court that the admission hearing was part of an administrative proceeding, and that, on this basis, the ruling amounts to no more than a holding that a rule of court which requires an oath in an administrative proceeding will not support an indictment for perjury. Even on this interpretation of the holding, the claim of unimportance fails. Certainly, it is important for courts to know whether, as a means to enforcement of their rules of administration adopted pursuant to 28 U.S.C. 2071 (conferring authority to "prescribe rules for the conduct of their business"), they are empowered to administer oaths. If the grant of rule-making authority carries such power with it, then the perjury statute (covering "any case in which a law of the United States authorizes an oath to be administered") perforce applies even if the proceeding be deemed to involve an exercise of administrative, rather than judicial, power.

Moreover, we do not believe that the district judge (in this case, a judge from a different district sitting by designation) could properly treat as merely administrative (or ministerial) rules relating to the admission and removal of attorneys. This Court has said, in relation to the admission of attorneys to practice in federal courts, that such a proceeding "is

not the exercise of a mere ministerial power. It is the exercise of judicial power, and has been so held in numerous cases." *Ex parte Garland*, 4 Wall. 333, 378-379. See, also, *Randall* v. *Brigham*, 7 Wall. 523, 535; *Ex parte Secombe*, 19 How. 9, 15. Even where a state regarded a proceeding for admission as administrative, this Court held in *In re Summers*, 325 U.S. 561, 568-569:

> A claim of a present right to admission to the bar of a state and a denial of that right is a controversy. When the claim is made in a state court and a denial of the right is made *by judicial order*, it is a case which may be reviewed under Article III of the Constitution when federal questions are raised and proper steps taken to that end, in this Court. [Emphasis added.]

See, also, *Schware* v. *Board of Bar Examiners*, No. 92, O.T. 1956, and *Konigsberg* v. *State Bar of California*, No. 5, O.T. 1956, both decided on May 6, 1957. By the same token, a rule which represents an exercise of judicial power by the district court cannot become a rule of administration even if the court should call it such.

In the instant case, the district court *entered an order* fixing a date for appellee to appear and be examined under oath pursuant to the local rule (Juris. St. 11). Three hearings were held in all and the court then *entered an order* finding that the applicant had not made satisfactory showing under the local rule to warrant admission (Juris. St. 11-12). The procedure followed confirms the conclusion that the hearing was a judicial one.

Although this Court is bound by the construction of the indictment as a pleading, when "the District Court holds that the indictment, not merely because of some deficiency in pleading but with respect to the substance of the charge, does not allege a violation of the statute upon which the indictment is founded, that is necessarily a construction of that statute" (*United States* v. *Borden Co.*, 308 U.S. 188, 193). That is the case here. The district judge held that a rule regulating the admission of attorneys and requiring an oath in connection therewith does not have sufficient force of law to bring the perjury statute into play. That ruling, which we believe to be clearly erroneous, cannot bind this Court.

CONCLUSION

For the reasons set forth in the Jurisdictional Statement and in the foregoing brief, probable jurisdiction of this appeal should be noted.

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